No. 89-7743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THADDEUS DONALD EDMONSON,
Petitioner,

v.

LEESVILLE CONCRETE COMPANY, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I.

Should the rule of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), be adopted in Civil Cases in the U.S. District Courts to prohibit a party from exclusion from the jury venire by means of peremptory challenge, a member of the same minority race as his opposite litigant, when a *prima facie* showing pursuant to the *Batson* burdens of proof have been made?

II.

Is a U.S. District Judge empowered to supervise the exercise of Peremptory Challenges by a Party pursuant to 28 U.S.C. 1870, if it be shown by *prima facie* proof that such exercise is taking place in a constitutionally impermissible matter?

III.

When a private lawyer appearing in the course of litigation on behalf of a private party against a member of a minority discriminatorily utilizes a power granted to him by the sovereign, does that private counsel engage in "State Action" sufficient to bring him within the constitutional limitations imposed by the Equal Protection Clause of the Fourteenth Amendment?

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DECISIONS BELOW

The opinion of the U.S. Circuit Court for the Fifth Circuit, is reported at 890 F.2d 308 (5th Cir. 1988). The decision of the U.S. Court of Appeals, Fifth Circuit, sitting *en banc*, is reported at 895 F.2d 218 (5th Cir. 1990).

STATEMENT OF JURISDICTION

The Petition of Thaddeus Donald Edmonson seeks review of the judgment of the U.S. Court of Appeals, Fifth Circuit, entered on the first day of March, 1990, pursuant to an *en banc* rehearing. The original panel

opinion was entered on the fifth day of December, 1988. On the 23rd day of March, 1990, the Court of Appeals for the Fifth Circuit issued its mandate.

This Petition is filed timely pursuant to 28 U.S.C. 2101 (C). This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254 (1).

STATUTES PRESENTED FOR REVIEW

I.

United States Constitution, Amendment 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II.

United States Constitution, Amendment 7

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

III.

United States Constitution, Amendment 14

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State

> wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV.

28 U.S.C. 1861. Declaration of Policy

> It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the Court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

V.

28 U.S.C. 1862. Discrimination Prohibited

> No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States and the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

VI.

28 U.S.C. 1870. Challeges

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.
>
> All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

VII.

42 U.S.C. 1981. Equal rights under the law

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Thaddeus Donald Edmonson, a black male, instituted suit against Leesville Concrete Company in the United States District Court for the Western District of Louisiana, Lake Charles Division, alleging injuries resulting from negligence which Edmonson claimed occurred on a Federal enclave. The case was tried to a Jury composed of twelve persons.

Edmonson exercised his peremptory challenges pursuant to 28 U.S.C. 1870 when invited to do so by the Court, and excluded three white venire persons. Of the originally impaneled venire, three were members of the black race. The defendant used two of his three peremptory challenges to exclude black jurors.

Both Edmonson and Leesville were represented at Trial by privately-retained counsel. The exercise of the peremptory challenges was made in each instance after the Court had conducted *voir dire* examination of the jury panel (reproduced in the join appendix in its entirety).

Included within the same panel facing counsel at the time were four persons who acknowledged a personal relationship with Edmonson's counsel, or one of his law partners. Additionally, prior to tendering the panel for peremptory challenge, the Court excluded, for cause, a

juror who voiced on *voir dire* a racial animus toward members of the Plaintiff's race (J.A., at pp. 31-32).

The challenges were made in writing by the two counsel. Specific jurors were challenged by name on a form presented for that purpose to counsel by the Court (J.A., at p. 46).

When the Defendant used his peremptory challenges to strike members of the same race as Plaintiff, objection was made, citing *Batson v. Kentucky*, 106 S.C. 1712, 90 L.Ed.2d 69 (1986) (J.A., at p. 47). In connection with his objection, counsel suggested that Edmonson had presented *prima facie* proof which would key the provisions of *Batson*, namely: (1) that Edmonson was a member of a cognizable racial group; (2) that the opposition had exercised peremptory challenges to remove from the *venire* members of Edmonson's race; and, (3) that those facts, together with other relevant circumstances—including the cursory *voir dire* performed by the Court, which failed to reveal the age of two of the excluded jurors; the lack of questions asked by counsel for Leesville; and the challenging of black jurors over others whose connection with Edmonson's counsel would seem to make them less desirable—required the Court to make further inquiry to confirm Leesville had racially-neutral reasons for striking the two members of Plaintiff's race. *Batson*, 106 S.Ct. at p. 1723.

After some considerable discussion, the Court disallowed Edmonson's Constitutional claim (J.A., at pp. 47-49, 50-53), refused to require Leesville's counsel to state a racially-neutral basis for excluding the challenged black jurors, and empaneled the jury without the challenged black jurors over Edmonson's continuing objection.

The case then proceeded to trial. The selection procedures employed by Leesville were obviously intended to impact on Edmonson, particularly considering the nature of the case. Edmonson was injured when struck by a

piece of equipment on the work place. He claimed a variety of injuries resulting from that accident, culminating in a surgical procedure which was employed on his neck. The attacks made on Edmonson by Leesville primarily concerned themselves with his credibility. The credibility of the plaintiff was most at issue in the relationship between the accident and the later neck surgery which was performed. In large part, whether the jury connected the event with the surgery had to do with whether they believed Edmonson's testimony.

Leesville, in making this case, sought the services of Dr. Paul P. Ware, a licensed psychiatrist in Shreveport, Louisiana, which is a five-hour drive from the site of the trial. Edmonson attended two examinations conducted by Dr. Ware voluntarily after Leesville sought them. Dr. Ware is white.

His testimony consisted of the results found by him on his examination and other testimony, including his surreptitious observations of Edmonson conducted through his office window while Edmonson was in the parking lot of Ware's office. From these observations, the testing that he did, and the examination he conducted, Dr. Ware, who testified live at the trial as an expert witness, concluded Edmonson was lying and malingering. Because of the disparity between Edmonson's demands and the ultimate result, it is clear the jury believed the testimony of Dr. Ware, and, from that conclusion, believed Edmonson was lying. The ultimate credibility determination made in the case, then, was made by a jury which had been handpicked by Leesville to exclude members of Edmonson's race, who may have otherwise been anticipated to be predisposed towards Edmonson's position.

Edmonson was awarded $90,000 by the jury, an amount which did not far outstrip his medical expenses, but had this award reduced 80% for his alleged contributory negligence. On appeal, the Fifth Circuit panel reversed, applied *Batson* to the Constitutional challenge

made by Edmonson, and remanded to the Trial Court for further consideration of Edmonson's constitutional claim. On rehearing *en banc*, the Circuit Court reversed the panel, finding Edmonson's claims lacked Constitutional merit because no state action could be found.

It is from that decision this Petition proceeds.

SUMMARY OF ARGUMENT

I.

The unfettered use of peremptory challenges, even in cases where it is clearly based upon group bias, deprives a litigant of his "fair possibility for obtaining a representative cross-section of the community" on his jury, deprives a minority juror of his liberty interest in serving on a jury, and casts into doubt the fairness of the jury system.

II.

This Court's consistent interpretation of the Civil Rights Act of 1866, together with the post-Civil War amendments, provides an ample basis for an examination of the motives of counsel exercising peremptory challenges in a jury trial in the United States District Courts. An examination of the motive behind those challenges requires not only that the judge exercise his option to intervene when racial motivations are shown by inference, but obliges him to do so.

III.

The actions of a private lawyer in utilizing a peremptory challenge statute to exclude members from the jury venire based on their race constitutes state action, since his effort in this regard is assisted by the sovereign, and thus, necessarily manipulates government action to a sufficient degree that his actions may be fairly attributed to the Government.

IV.

This Court has the supervisory authority to correct errors in the United States District Courts concerning the exercise of peremptory challenges based upon race, and the exercise of that supervisory authority is appropriate in this case.

ARGUMENT

Thaddeus Edmonson's Constitutional claim arose when he lost his "fair possibility for obtaining a representative cross-section of the community" [1] on this jury by virtue of Leesville Concrete Company's exercise of peremptory challenges to strike African-Americans.

Edmonson's invocation of his rights is based on this Court's decision in *Batson v. Kentucky* [2] as well as its consistent recognition of the Constitutional requirement of fair play, particularly when the issue turns upon a challenged jury selection process based upon invidious racial or, in some cases, economic [3] group bias.

Opposed to this proposition, Respondent first argues for a narrow interpretation of the state action requirement espoused by the Fifth Circuit's *en banc* majority. Respondent also makes little effort to disguise the central theme of its argument: that, if discrimination exists in jury selection in a civil case, insofar as that discrimination is activated by a litigant's statutorily-granted exercise of peremptory challenges [4], it is no business of the Court.

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[1] *Williams v. Florida*, 399 U.S. 78, at p. 100; 90 S.Ct. 1893, at p. 1906; 26 L.Ed. 446 (1970); *Harlan v. Illinois*, —— U.S. ——, 110 S.Ct. 803 (1990), at p. 825, dissent of Justice Stevens.

[2] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[3] *Thiel v. Southern Pacific Company*, 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1946).

[4] 28 U.S.C. 1870.

At the outset, it must be said that such a proposition is "at war with our basic concepts of a democratic society and a representative government" [5] and in direct conflict with the policies enunciated by this Court since the War Between the States.

The aberrant position of Respondent, and of the Fifth Circuit, 895 F.2d 218 (5th Cir. *en banc* 1990), is easily demonstrated by review of the enunciated policies of this Court with respect to jury selection and the use of peremptory challenges, and the exercise of the Court's power to recognize and correct judicial error committed contrary to our fundamental democratic institutions.

I. REVIEW OF STATUTORY PROVISIONS RELATING TO JUROR QUALIFICATIONS AND PEREMPTORY CHALLENGES: LEGISLATIVE HISTORY OF THE 1866 CIVIL RIGHTS ACT AND THE POST-CIVIL WAR AMENDMENTS

Although the Civil War and the Thirteenth Amendment abolished the slavery of the black race, its effects continue to be pervasive. As the first Court concerning itself with the post-Civil War amendments noted:

> . . . [N]otwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal Government, be almost as bad as before. Among the first acts of legislation adopted by several of the States . . . , were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in their pursuit of life, liberty, and property to such an extent that their freedom was of little value . . .
>
> They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it.

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[5] *Smith v. Texas*, 311 U.S. 128 at p. 130, 61 S.Ct. 164 at p. 165, 85 L.Ed. 84 (1940).

> They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.[6]

A series of statutes was passed to rectify this previous condition of servitude, most notably the Civil Rights Act of 1866.[7] That Act, with its mandate that all persons have equal enumerated rights to "make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings . . ." precisely focused upon those identified evils. Its legislative history, recently examined in extensive detail by this Court,[8] established the intent of Congress:

> If any person, "under color of any law," shall subject another to the deprivation of a right to which he is entitled, he is to be punished . . . . In some communities in the South, a custom prevails by which different punishment is inflicted upon blacks from that meted out to whites for the same offense. Does this section [Section 2] propose to punish the community where the custom prevails? Or is it to punish the person who, under color of the custom, deprives the party of his right? It is a manifest perversion of the meaning of the section to assert anything else.[9]

The Act, then, "constituted an initial blueprint of the Fourteenth Amendment." [10] Two months later, Congress

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[6] *The Slaughter House Cases*, 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394 (1872).

[7] 42 U.S.C. 1981.

[8] *Jett v. Dallas Independent School District*, 109 S.Ct. 2702, —— U.S. ——, 105 L.Ed.2d 598 (1989).

[9] *Id.* at p. 2714, Speech of Senator Trumbull.

[10] *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 at p. 389; 102 S.Ct. 3141 at p. 3149; 73 L.Ed.2d 835 (1982).

passed a joint resolution sending that amendment to the States for ratification.

Its "majestic generalities," [11] and its explicit guarantee to all parties of the "equal protection of the law," provides the basis for many arguments advanced against the deprivation of the rights of black citizens. But its phraseology is not limited to those actions which are engaged in by a state, particularly when the issue being examined concerns racial discrimination.[12] As this Court said in 1880:

> The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealously and a positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discrimination against them had been habitual . . . The colored race, as a race, was abject and ignorant, and in that condition was unfit to command the respect of those who had superior intelligence . . . They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the pro-

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[11] *Fay v. New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043 (1947).

[12] Cf. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

> tection of the general government, in that enjoyment, whenever it should be denied . . .[13]

Strauder specifically concerend itself with the issue before the Court today—the exclusion of black citizens from a jury. The ultimate result was to find this practice constitutionally repugnant, and violative of the spirit and intent of both the Fourteenth Amendment and Section 3 of the 1866 Act.

There is no doubt Congress specifically had in mind the ability of black citizens to obtain justice in the courts when it enacted these laws, and the post-Civil War amendments. It codified these principles in 1875 by enacting a statue providing:

> . . . [N]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as a grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude . . .[14]

The original statute, making no distinction between civil or criminal litigation, contained an unambiguous clarity of motivation soon recognized by this Court:

> For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination . . . A Negro who confronts a jury on which no Negro is allowed to sit . . . might very well say that a community which purposely discriminates against all Negroes discriminates against him.[15]

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[13] *Strauder v. West Virginia*, 100 U.S. 303 at p. 305; 10 Otto 303 at p. 305; 25 L.Ed. 664 (1880).

[14] 18 Stat. 336-37, former 8 U.S.C. § 44; *see also* 28 U.S.C. 1862 (1968).

[15] *Fay v. New York*, 332 U.S. 261, at p. 282-3; 67 S.Ct. 1613, at p. 1625; 91 L.Ed. 2043 (1947).

Currently, the right by which civil litigators exercise peremptory challenges is found in 28 U.S.C 1870, which provides, "in civil cases, each party shall be entitled to three premptory challenges." But, read together with the consistent statutory scheme of the Congress and the proscriptions placed upon its use by this Court and the Fourteenth Amendment, it is clear the current statute may only be constitutionally enforced in the absence of racially-discriminatory selection procedures:

> If the Congress had the poor judgment to enact a statute declaring, "peremptory challenges may be used to excuse jurors on the basis of their race," there would be little doubt that the statute would be unconstitutional. This conclusion ineluctably follows from the decision in *Reitman v. Mulkey*, [387 U.S. at p. 371, 87 S.Ct. at p. 1629] in which the Supreme Court held unconstitutional California Proposition 14, an amendment to the State Constitution permitting any person to decline to sell or lease property to another person "as he, in his absolute discretion chooses." By adopting this amendment, the Supreme Court held, the state affirmatively sanctioned private discrimination as one of its basic policies. Interpreting 28 U.S.C. 1870 to allow the exclusion of jurors because of their race would condone conduct that could not be explicitly allowed.[16]

Any opposite conclusion leads to an absurd result. If Leesville's counsel had the ability of renting space in the same Federal courthouse where the jury was empaneled for the purpose of feeding his witnesses in a federally-owned cafeteria, he could not, consistent with the law, exclude members of the black race from his party.[17] The Government which so profoundly concedes

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[16] *Edmonson v. Leesville Concrete Co., Inc.*, 860 F.2d 1308 (5th Cir. 1988) at p. 1312, Panel Opinion of Judge Rubin.

[17] *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

itself with such an event cannot, within the same constitutional scheme, apply a lesser degree of protection to those who would sit in the jury box to hear the case.[18]

II. EXCLUSIONARY JURY PROCEDURES USING GROUP BIAS AS THE DETERMINATIVE FACTOR HAVE CONSISTENTLY BEEN CRITICIZED BY THIS COURT

Although many early cases addressing the issue of jury selection focused on the "fair possibility" of obtaining an impartial jury at the pool stage,[19] this Court's modern view establishes that *any* procedure whick operates to "stack the deck" in favor of one race or class over another is impermissible.

While *Batson* primarily addressed the issue of a criminal litigant's life or liberty interest in obtaining the "fair possibility" of an impartial jury, it also recognized other injured parties, including the excluded juror. By now, at least the latter principle is "the established rule . . ." [20]

Any process legalizing the exclusion of jurors based on group bias is so contrary to our fundamental ideals of fairness that this Court has extended its standing requirement first voiced in *Batson* to include any litigant, even one not a member of the excluded class.[21] The target of this effort, then, is not only the enforcement of the rights of a minority litigant, but the protection of the jury system:

> To bar the claim whenever the defendant's race is not the same as the juror's would be to concede that

[18] *See also, Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978).

[19] *Cf. Thiel v. Southern Pacific Company, supra.*

[20] *Holland v. Illinois*, 110 S.Ct. 803, —— U.S. ——, 107 L.Ed.2d 905 (1990), concurrence of Justice Kennedy.

[21] *Ibid.*

> racial exclusion of citizens from the duty, and honor, of jury service will be tolerated, or even condoned. We cannot permit even the inference that this principle will be accepted, for it is inconsistent with the equal participation in civic life that the Fourteenth Amendment guarantees.[22]

Thus, *Batson's* original requirement that a litigant only achieves standing to complain of the juror's exclusion when he is a member of a "cognizable racial group" has been loosened. Since it has, the focus is no longer on the life or liberty interest of the person challenging the act, but on the harm to the system.

A juror excluded by peremptory challenge from either a civil or criminal case would have the same legal right to bring suit complaining of the action.[23] This seems to be true whether an equal protection analysis is used, or by invoking the inherent supervisory power of the Federal courts:

> On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class . . . It is likewise immaterial that the jury which actually decided the factual issues in the case was found to contain at least five members of the [excluded] class. The evil lies in the admitted wholesale exclusion of [the class] in disregard of the high standards of jury selection. To reassert these standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen.[24]

Whether the machinery of discrimination involves differentiation of groups based on a color-coding system in

[22] *Ibid.*

[23] *Carter v. Jury Commission of Greene County*, 396 U.S. 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed. 549 (1970).

[24] *Thiel, supra* at p. 988.

the jury tickets,[25] or by peremptory challenge,[26] the same result is reached: It allows "those to discriminate who are of a mind to discriminate." [27] Thus, while the initial focus of this Court's attention was on the fair cross-ssection requirement as concerns the makeup of jury venires, it has unquestionably been extended, at least in cases of racial group bias, to peremptory strikes which achieve the same result.

When racial discrimination is the undoubted object of the questioned action, this Court has always applied closer scrutiny:

> . . . [T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.[28]

The same high standard applies to private conduct, overriding the interests of parents in their decision regaring where, and by whom, their child is raised:

> Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial

[25] *Avery v. State of Georgia*, 345 U.S. 559, 73 S.Ct. 891 (1953), 91 L.Ed. 1244.

[26] *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824 (1965).

[27] *Avery, supra*, at p. 562 (892 S.Ct.).

[28] *Bolling v. Sharpe*. See Footnote 11, *supra*.

> prejudice that they assume to be both widely and deeply held." (citations omitted)[29]

Governmental oversight as an equal protection concept also extends to the private conduct of parents whose educational plan for their children places them in a school which discriminates in its admissions policy based on the race of prospective students,[30] and to private hiring decisions made by employers.[31] Even the sovereign's interest in fighting the war on drugs is subject to examination when it appears a drug courier profile contains a racial component.[32]

With such a strong policy statement in place for so many years, it is not surprising the actions of lawyers in selecting juries through the devices made available to them by the sovereign are also subject to scrutiny. Even without the aggravating presence of state action (See § 3, *infra*), such conduct is subject to judicial examination. It cannot logically be said that, if a parent's interest in where and with whom his children will live; where they will attend school; or an employer's interest in the makeup of his work force is reviewable by the courts on grounds of racial bias, that the actions of counsel, performing on a stage provided by the sovereign, guided by the laws and customs established by the sovereign, are not.

Just as the sovereign has an interest in levelling the playing field for schoolchildren and employees, prospec-

[29] *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984).

[30] *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976).

[31] *Patterson v. McLean Credit Union*, —— U.S. ——, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989).

[32] *U.S. v. Taylor*, No. 89-6396 (6th Cir., October 25, 1990).

tive property owners,[33] group access to governmental facilities,[34] and bar admissions [35] by removing the bumps of group bias, it has an interest in preserving the operation of its courts. Indeed, these concerns were primary in *Batson*:

> Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. . . . A person's race simply "is unrelated to his fitness as a juror." . . . As long ago as *Strauder*, therefore, the Court recognized that in denying a person participation in jury service on account of his race, the excluded juror . . .
>
> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice . . . Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." [36]

One district court considering the same issue has specifically recognized the practical application of this expressed ideal of fairness in a Seventh Amendment case:

> Although the Seventh Amendment preserves "the right of trial by jury" in civil cases, it does not expressly provide for the jury's impartiality. Yet the impartiality of the jury "is inherent in the right of trial by jury and is implicit in the requirement of the Fifth Amendment . . ." It is the role of a

[33] *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

[34] *Burton*, see Footnote 17, *supra*.

[35] *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985).

[36] *Batson*, at p. 1717-18 (bracketed material supplied).

> district court to safeguard a litigant's constitutional right to an impartial jury during all stages of trial, commencing with jury selection and ending when the jury returns its verdict.[37]

In the Howard Beach case,[38] tried in a state whose constitutional provision was "synonymous with the Fourteenth Amendment," the court, using the same considerations, and citing the Fifth Circuit's original panel opinion in *Edmonson*, extended the ban on racially-motivated peremptories to the defense attorney, using the same policy arguments. As Judge Rubin said for the original majority:

> Justice would indeed be blind if it failed to recognize that the federal court is employed as a vehicle for racial discrimination when peremptory challenges are used to exclude jurors because of their race. The government is inevitably and inextricably involved as an actor in the process by which a federal judge, robed in black, seated in a paneled courtroom, in front of an American flag, says to a juror, "Mrs. X, you are excused." [39]

Even the dissenting panel member, who ultimately wrote the *en banc* majority opinion, recognized the logical end of petitioner's argument:

> The sweeping result in today's case seems to me so unfortunate that I cannot join in it, even though the most dubious features of the majority opinion derive, not from the reasoning of my brethern, but from earlier decisions of the Supreme Court. Indeed, it may be arguable that—given those decisions—this result is unavoidable.[40]

[37] *Olsen v. Bradrick*, 645 F. Supp. 645 (D. Conn., 1986), at p. 653.

[38] *People v. Kern*, 547 N.Y.S.2d 4, 149 A.D.2d 187, 58 U.S.L.W. 2145 (N.Y.S.Ct., 1989)

[39] *Edmonson, supra*, at p 1313.

[40] *Ibid*, at p. 1315.

Reviewing *Shelley* and *Burton* together with two cases dealing specifically with alleged due process violations conducted by means of the judicial process,[41] which share the common limitation on the reach of governmental power into private action, Judge Rubin concluded:

> The Constitution that forbids judicial enforcement of covenants based on race equally prohibits judicial enforcement of peremptory challenges so motivated. The Constitution that forbids private parties to discriminate based on race through the use of a state non-claim statute equally prohibits private parties from so discriminating through the use of a federal peremptory challenge statute. The Constitution that forbids a private restaurant on state-owned property to discriminate based on race equally prohibits a private party in a federal courtroom from so discriminating.[42]

His eloquent and impassioned dissent to the *en banc* ruling, joined by three others, is in the same vein:

> Racial prejudice was sanctioned by both the original Constitution and the Bill of Rights. The enactment of the equal protection clause marked the beginning of a new era, an era in which it was to be hoped that the color of a person's skin would not affect his legal rights. . . .
>
> Edmonson's invocation of his Constitutional rights compels us to acknowledge the scope of judicial culpability in administering the racially discriminatory exercise of peremptory strikes against what remains, at least if unblemished, a cherished bulwark against every misuse of authority. . . . I regret that the majority cannot yet see that to permit a person to be rejected from a jury solely because of the color of his skin rejects the promise upon which this nation's independence was based and the guarantee that the Fourteenth Amendment provides: that all persons are created equal. In God's sight. In human right. And in regard to service on a federal jury.[43]

[41] *Lugar v. Edmonson Oil Company*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed. 482 (1982); *Tulsa Professional Collection Service v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988).

[42] *Edmonson, supra*, at p. 1312 (panel opinion).

III. THIS COURT'S AUTHORITY TO INTERVENE: 42 U.S.C. 1981, SUPERVISORY POWER, AND STATE ACTION

The opinion of this Court will not be written on a blank slate. The *Batson* requirement facing Edmonson at the time of the opposition's exercise of challenges was met, but one additional factor shows the end result which will inevitably be reached based on an unfettered exercise of peremptories.

The Lake Charles Division of the United States District Court for the Western District of Louisiana is composed of the Parishes of Allen, Beauregard, Calcasieu, Cameron, Jefferson Davis, and Vernon. According to the 1980 census, the racial makeup of those parishes is 19.7% black, 78.9% white.

The jury selection process used by the District Judge required him to ultimately empanel twelve jurors.[44] To reach that number, eighteen names were drawn at random and seated in the order they were called in the jury box. Since each side had the ability to exercise three peremptories, the first twelve jurors not stricken made up the panel.

Three black jurors were among those selected for the venire. At that level, they constituted 16.7% of the jurors facing counsel, a number not statistically different from the percentage of blacks in the population from which the jury was drawn. Thus, by the unfettered exer-

[43] *Edmonson, en banc* panel opinion, at p. 240.

[44] J.A. at p. 14.

cise of three peremptory challenges, counsel for respondent had the opportunity to deprive Edmonson of any "fair possibility" of obtaining a representative jury, i.e., one on which blacks were represented.

A. The Option of the District Judge

Petitioner's position has always been that he established a prima facie case at the trial level without any specific racial animus being expressly voiced to the court by respondent. But *query*: What if, instead of relying on the voir dire as is, counsel for respondent stood up when the three black members were empaneled, announced to the court that, solely on the basis of their race, he was going to strike them peremptorily from the jury, and there was no need for voir dire. Would the trial judge then have been obligated to honor his request under 28 U.S.C. 1870?

If so, the judge would be an actor in a process of discrimination. If it is a given that a juror so excluded obtains a right of action under the 1866 Act,[45] by what rational basis would the judge be excluded as a defendant if his actions gave effect to the bias so clearly displayed?

If there comes a point when the trial judge has the *option* of refusing to give effect to peremptory challenges, an *obligation* arises when the same facts are presented, either by inference or by explicit statement.

Such activity taking place in a federal courtroom is far from private. But even if it is, per *Runyon*, *Shelley*, *Patterson*, and *Burton*, it cannot be outside the statutory scheme of the 1866 Act, or the Fourteenth Amendment.

Thus, the second question presented for review by Edmonson must be answered in the affirmative: A trial judge *is* empowered to supervise the exercise of peremp-

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[45] *Carter, supra* at Footnote 23; *Holland v. Illinois, supra* at Footnote 20, concurrence of Justice Kennedy.

tory challenges pursuant to 28 U.S.C. 1870. If he is, the shibboleth that he cannot, raised by respondent, evaporates.

B. Supervisory Power

Independent of any other basis upon which this Court could act, it has supervisory authority to correct errors by lower courts.

The trial judge in this case clearly believed he was without authority to command respondent to voice a racially-neutral reason for the exercise of his peremptory challenges [46] or to otherwise intervene in the process. This perception is wrong. If so, this Court best performs its judicial function by correcting the misperception.

A similar situation was encountered by this Court in *Thiel*, which recognized the inequity of result which occurred, but did not, within the body of the decision, seek to identify any particular actor in the process as the culprit, and did not resort to any analysis of due process, Fourteenth Amendment versus Fifth Amendment rights, or any requirement of "state action" in the procedure employed. Rather, recognizing both the inequity which existed as to the specific litigant and the damage which would be wrought on the jury system were it allowed to stand, the Court invoked its supervisory authority, identified the evil, and corrected it by reversing the judgment.[47]

This issue was squarely addressed by the Fifth Circuit in an *en banc* case decided while *Batson* was under consideration by this Court, and later vacated.[48] In dissent, Judge Williams, after posing a hypothetical identical to that posed by Petitioner above, said:

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[46] J.A., at p. 51.

[47] *Thiel*, at p. 988, citing *McNabb v. U.S.*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 879 (1943).

[48] *United States v. Leslie*, 783 F.2d 541 (5th Cir. *en banc* 1986); vacated 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed. 128 (1987).

> The role and the scope of the supervisory power are delineated by establishing four basic propositions. . . . First, this Court possesses broad supervisory powers over lower courts. Second, there is no doubt that the supervisory powers of federal courts may be used to correct injustices which do not amount to constitutional or statutory violations. Third, the supervisory power—encompassing broadly several forms of deterrents of prosecutorial misconduct—is appropriate on the facts of the present case. Fourth, although Congress undoubtedly has the right to override supervisory power rulings through legislation, Congress has not spoken with respect to the narrow holding of the panel [which reversed the conviction based on the racially-motivated strikes].[49]

Judge Williams' dissent also points out the variety of instances where judicial rule-making has occurred, including new jury selection standards for civil actions; establishing standards for administrative hearings;[50] to reverse convictions supported by false evidence; to curtail improper practices by federal attorneys; to suppress evidence gained by misconduct; and to protect a defendant from an overzealous district court judge.

This Court has exercised its supervisory power in exactly the fashion sought by Petitioner. When women were excluded from jury service, and were determined to be a member of a "distinctive group," the Court's supervisory power was invoked as the *only* basis for changing the rule of the case.[51] The Court's supervisory power has

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[49] *Ibid.* at 568, citing also *McNabb, supra*; *U.S. v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), for the proposition that "The supervisory power allows courts to 'preserve judicial integrity by insuring that a conviction rests upon appropriate considerations validly before the jury.'"

[50] Citing *Woodby v. I.N.S.*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966).

[51] *Ballard v. United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946).

been characterized as subject to no substantial limitations, save those conferred on it by legislative action,[52] and is exercised primarily on grounds of overriding judicial policy:

> The variety of situations in which it has been invoked defies any attempt to construct a definition of supervisory power which is at once comprehensive and accurate . . . The sole common denominator of its usage is a desire to maintain and develop standards of fair play in the federal courts more exacting than the minimum constitutional requirements of due process.[53]

C. State Action

Respondent, in his opposition to the petition, suggests this case is distinguishable from others in which Circuit Courts[54] reach the contrary conclusion because the litigants here are private, as opposed to governmental. His argument in this regard is misplaced and overly technical. It is respectfully submitted that the Fifth Circuit's *en banc* panel, while it correctly identified the issues to be decided, did not resolve them correctly.

At the outset, it should be obvious petitioner does not concede state action is required in any classic sense for his position to prevail. If it is, though, the governmental nature of the transaction is apparent.

First of all, this Court has recognized in two opinions, *Lugar*[55] and *Pope*,[56] that private litigants can violate "due process" of others when they engage the system as

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[52] Note, *The Supervisory Power of the Federal Courts*, Harv.L. Rev. 1656 (1963).

[53] Note, 53 Geo.L.J. at p. 1050, as cited in *Leslie, supra*.

[54] *Fludd v. Dykes*; 863 F.2d 822 (11th Cir., 1989); *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir., 1990).

[55] Cited at Footnote 41, *supra*.

[56] Cited at Footnote 41, *supra*.

a co-actor. When this occurs, such counsel acts with the "significant assistance of the sovereign." In *Lugar*, the plaintiff sought damages, by means of an action under 42 U.S.C. 1983, resulting from an alleged wrongful seizure of property. Deciding what circumstances would result in a "fair attribution" of the actions of the parties to the state, the Court devised a two-part approach:

> First, the deprivation [of a federal right] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.[57]

Judge Gee, writing for the *en banc* majority [58] and in dissent to the panel opinion,[59] concedes the first prong of *Lugar* is satisfied. In addressing the second point, Judge Gee, as does respondent, relies on this Court's decision in *Polk County v. Dodson*.[60] *Dodson* is a poor analogy to the present situation, primarily because the finding that the public defender had acted "under color of state law" was jurisdictional in view of the nature of the action (42 U.S.C. 1983). Second, the underlying lawsuit had little to do with the public defender's employment relationship with the state, and everything to do with the quality of the representation she provided. Dodson's complaint was personal against his attorney, not against the institution which employed her.

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[57] *Lugar, supra*, at p. 2753-4.

[58] At p. 221.

[59] At p. 1315.

[60] 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

In the present context, although this Court has never so held and need not do so as part of its decision, the more modern rule seems to be that a defense lawyer in a criminal case engages in state action, at least when exercising peremptory challenges based on group bias.[61] In *Fludd*, although one of the parties was a governmental official, *Batson* was extended without resort to this fact.[62]

Thus, the lawyer, acting with the significant assistance of the sovereign, supplies the requisite state action needed to transform his exercise of peremptory challenges from private action to state action, reachable without further qualification by the dictates of the Fourteenth Amendment.

The *en banc* majority gives short shrift to the proposition that the Court's allowance of the peremptory challenge, in and of itself, constitutes state action. It quotes *Swain* in stating that the peremptory challenge "is one exercised . . . without being subject to the Court's control . . ." [63] It characterizes the judge's actions as "merely ministerial" and a "mere standing aside . . ."

This minimalist view of the trial judge is not supported by trial practice, or by other elements of the statutory scheme which allow the judge to intervene in decisions which are no different in character than a decision whether or not to allow a peremptory challenge. As Judge Rubin pointed out in his dissent:

> . . . [T]he trial judge may affect every aspect of the exercise of peremptory challenges. Most plainly, the judge has broad discretion in determining the

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[61] *People v. Kern, supra*, at Footnote 38; *People v. Gary M*, 138 Misc.2d 1081, 526 N.Y.S.2d 986 (1988); *People v. Wheeler*, 22 Cal.3rd 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978); Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review*, 19 Tex.Tech.L.Rev. 921 (1988).

[62] *Fludd, supra*, at p. 823.

[63] 865 F.2d at p. 221.

appropriate number and allocation of peremptory challenges in all multi-party cases, and may even limit ten criminal co-defendants to a total of ten peremptory challenges.

Less directly, courts determine the impact of any given number of peremptory strikes. Local court rules control the number of jurors that are eventually impaneled in civil cases, thereby governing the relative effectiveness of peremptory challenges in determining the composition of the jury. Individual judges control the conduct of *voir dire* and the information that may be discovered about the venire, thus affecting the exercise of both peremptory challenges and challenges for cause. Of course, by virtue of the trial judge's broad discretion over the exercise of challenges for cause, he may determine the number of jurors who remain eligible for the exercise of peremptory strikes, or the court's own strikes, for eventual impaneling . . .

> The majority's view of the court's "purely ministerial role" in supervising peremptory challenges is perhaps most strikingly belied in the trial judge's broad discretion to determine the manner in which peremptory challenges are exercised: he may decide which side exercises the last challenge, may require simultaneous exercise of challenges by prosecution and defense, and may even require that one party exercise her challenges first, thereby allowing the other party to then act with full knowledge of her opponents choices. [Footnotes Omitted] [64]

The true role of the judge is best described in *People v. Gary M* [65]:

> . . . [T]he State is not merely an observer of the discrimination, but a significant participant . . . . The only thing the State does not do is make the

[64] 865 F.2d, at pp. 233-4.

[65] Cited at Footnote 61, *supra*.

> decision to discriminate. Everything else is done or supplied by the State.[66]

The "action" taken by the trial judge is no different when he "stands aside" in the face of a blatant exercise of racial discrimination in the selection process, than when such an exercise is proved by inference in accordance with *Batson*'s terms. Had Judge Veron, in compliance with the undisputed policy of this Court, recognized even the mere possibility that the opposition was engaging in discriminatory use of peremptory strikes, the situation now before the Court could have been avoided.

The judge's conscious decision to stand aside was apparently based on a misconception and a misapplication of the law. He clearly believed the only relevant discrimination which could take place was that occasioned by the original empaneling of the venire [67] rather than the action of Leesville's counsel in striking two of the three black persons from the jury. This focus on the procedure employed was misplaced. If the *Batson* inferences were met by Edmonson, the court was compelled, not to stand aside, but to engage Leesville's lawyer in an active discussion of the underlying reasons for exercising the strikes.

No indication appears in the record of a relationship between that exercise and "the particular case to be tried," as required by *Swain* in that portion of the opinion which survives *Batson*. Leesville's self-serving decision to allow one of the three black jurors to remain cannot be interposed in opposition to the inference which the Circuit Court appeared not even to question, either in panel opinion or the *en banc* majority.

The decision of Judge Veron to stand aside thus constituted "action" as surely and completely as if the op-

[66] *Ibid*, at p. 994.

[67] J.A., at pp. 52-53.

position's lawyer had confirmed those inferences by explicit statement. His action in that regard cannot be supported by precedent or a review of the peremptory challenge's history, or in any way squared with the overriding policy of the United States to seek out racial discrimination in governmental processes and eradicate it whenever it is found.

CONCLUSION

The unmistakable position of Respondent is that no Court has the authority to tell him he cannot exercise peremptory challenges in a civil case in federal court based on group bias. Although Respondent did not, like the lawyer in Judge William's *U.S. v. Leslie*[68] hypothet, announce in open court the exercise was made for racial reasons, his position is indistinguishable.

No substantial arguments are posed against the proposition raised by Petitioner, and indeed none is likely to be. It is only through the guise of Respondent's asserted hypertechnical position regarding state action that he avoids a decision on the ultimate issue: that *Batson* has been, and of right must be, extended to lawyers in civil cases for the policy reasons previously announced.

The Court cannot adopt Respondent's position without expressly overruling *Fludd v. Dykes* and casting into serious question *Carter v. Board of Jury Commissioners of Greene County.* The continued efficacy of the most recent decision of this Court regarding the issue would also be assaulted since five Justices appeared at that time to be united in the proposition that the focus of the inquiry inevitably involves the rights of the excluded juror.[69]

The end is certainly just: the eradication of racial discrimination from the federal jury selection process. The

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[68] See Footnote 48, *supra.*

[69] *Harlan v. Illinois,* cited at Footnote 1, *supra.*

means are constitutional, whether they be cast in terms of the statutory authority of 42 U.S.C. 1981, this Court's supervisory jurisdiction, or the commandments of the Fifth and Fourteenth Amendments.

For all these stated reasons, then, the decision of this Court must be to overrule the *en banc* majority of the Fifth Circuit, reinstate the panel opinion, and remand the case to the district court for further action in accord therewith.

Respectfully submitted,

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